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Cases, Regulations, and Statutes

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(2) the option, agreement, right or restriction is not a device to transfer the property to members of the decedent's family for less than full and adequate consideration; or

(3) the terms of the option, agreement, right or restriction are comparable to those obtained in similar arrangements entered into by persons in an arm's length transaction. **I.R.C. § 2703(b). Prop. Treas. Reg. § 25.2703-1(b)(1).**

The Conference report indicates that it is not the intent that a buy-sell agreement be ignored merely because its terms differ from those used by another, similarly situated

firm. General business practice may recognize more than one valuation approach even within the same industry. A binding agreement exclusively among persons who are not natural objects of each other's bounty meets the above three requirements. **Prop. Treas. Reg. § 25.2703-1(b)(3).** A right or restriction is comparable to similar arrangements entered into by persons in an arm's length transaction if the right or restriction is one that could have been obtained in a fair bargain among unrelated parties in the same business. **Prop. Treas. Reg. § 25.2703-1(b)(4).**

CASES, REGULATIONS AND STATUTES

by Robert P. Achenbach, Jr.

AGRICULTURAL LABOR

EMPLOYER LIABILITY. The plaintiff was the grandson of the defendant and worked on the defendant's dairy farm as a laborer. The plaintiff was injured while chasing a stray calf and sued the defendant for failure to warn of a dangerous condition. The court reversed the trial court's directed verdict for the defendant and held that a directed verdict was improper because there was evidence that the defendant knew about the dangerous condition, a fallen fence rail, and did not fix the condition. Evidence of the plaintiff's contributory negligence presented a jury question and could not be used to support a directed verdict. **McCord v. McCord, 575 So.2d 1056 (Ala. 1991).**

BANKRUPTCY

GENERAL

AVOIDABLE LIENS. The debtors sought to avoid a judicial lien against their homestead except to the extent of any equity remaining after the mortgage and the claimed exemption. The lienor argued that the lien was avoided only to the extent the lien impaired the exemption. The court held that the lien was avoided only to the extent the claimed exemption was impaired. **In re Sanglier, 124 B.R. 511 (Bankr. E.D. Mich. 1991).**

The debtor sought to avoid a judicial lien which was senior to a federal tax lien as impairing the homestead exemption. The debtor argued that under Section 724(b)(1), the judicial lien was junior to the tax lien because the judicial lien was avoidable. The court held that the seniority status of the judicial lien over the tax lien was not affected by the avoidability of the judicial lien unless the lien was actually avoided. Because the judicial lien did not impair the homestead exemption when considered in its priority status, the judicial lien remained senior to the tax lien. **In re Spearman, 124 B.R. 620 (E.D. N.Y. 1991).**

AVOIDABLE TRANSFERS. The pre-petition foreclosure sale of the debtor's homestead was held to be avoidable where the sale was not recorded until after the debtor filed Chapter 7 bankruptcy. **In re Williams, 124 B.R. 311 (Bankr. C.D. Cal. 1991).**

After being granted relief from the automatic stay, a secured creditor obtained foreclosure and sale of the debtors' farm. The creditor sought further relief from the stay when

the debtors refused to relinquish possession of the farm. The court held that the Bankruptcy Court could not relitigate the reasonableness of the sale price and granted relief from the stay. **Farm Credit Bank of Omaha v. Franzen, 926 F.2d 762 (8th Cir. 1991).**

Within three months prior to filing bankruptcy, the debtor transferred the debtor's one-half interest in the homestead to the debtor's nondebtor spouse. The court held that the transfer was avoidable where the debtor was insolvent at the time of the transfer and the transfer was made without consideration. **In re Osbourne, 124 B.R. 726 (Bankr. W.D. Ky. 1989).**

DISCHARGE. The debtor's debt to the seller of a combine was held nondischargeable where the debtor listed a positive net worth of \$ 1 million on the financial statement but nine days later listed a negative net worth of \$ -1.4 million on the bankruptcy schedules. The creditor was held to have reasonably relied on the financial statement in making the purchase loan. **In re Myers, 124 B.R. 735 (Bankr. S.D. Ohio 1991).**

ESTATE PROPERTY. The court held that the debtor's property subject to the PACA trust was not included in the bankruptcy estate. **Asinelli, Inc. v. Dole Fresh Fruit Co., 47 Agric. Dec. 1720 (Bankr. M.D. N.C. 1988).**

EXEMPTIONS. The debtors claimed as exempt the proceeds of milk sales still held by a third party. The trustee failed to object to the exemption within the time allotted by Rule 4003(b) but brought a late objection. The court held that where an objection is filed late, the exemption would be allowed if the debtor had a good faith statutory basis for the exemption. The court held that the debtors' exemption was not allowable under any statutory exemption and disallowed the exemption of the milk proceeds. **In re Kingsbury, 124 B.R. 146 (Bankr. D. Me. 1991).**

The debtors were allowed an exemption, under Tex. Ins. Code art. 21.22, § 1, for an uninsured/underinsured motorist's claim against their insurance company. **In re Hosek, 124 B.R. 239 (Bankr. W.D. Tex. 1991).**

In pre-bankruptcy planning, the debtor purchased a life insurance policy, a baby grand piano and a harpsichord, although the debtor did not play the instruments. The trustee objected to the debtor's claimed exemptions in the

items as pre-bankruptcy transfers with intent to defraud creditors. The court analyzed the Eighth Circuit remand opinion and determined that the test for the debtor's intent to defraud was whether the acquired exemption items were used, or reasonably anticipated for use, by the debtor for personal shelter and sustenance or for preservation of a business. The Bankruptcy Court held that the life insurance policy was purchased with intent to harm creditors because the debtor had no family or dependants to protect with such insurance. The two pianos were also not exempt because the debtor did not play and had no intention of playing the instruments. *In re Johnson*, 124 B.R. 290 (Bankr. D. Minn. 1991), *on rem. from* 880 F.2d 78 (8th Cir. 1989), *rem'g* 101 B.R. 997 (D. Minn. 1989), *aff'g* 80 B.R. 953 (Bankr. D. Minn. 1987).

The creditors objected to the debtors' homestead exemption, claiming that the debtors had moved out of the house and had rented a condominium for almost a year, with an option to purchase, but had moved back to the house at the time of the petition because the condominium was sold. In addition, the debtors had twice stated in written statements (actually made several weeks before the petition and move) that their residence was the condominium at the time of the petition. The court held, however, that the creditors had failed to prove the debtors' intent to abandon the homestead. *In re Ehnle*, 124 B.R. 361 (Bankr. M.D. Fla. 1991).

The debtor was allowed a homestead exemption in a residence subject to a former spouse's lien to secure payment of a property settlement representing the former spouse's interest in the house. *In re Swift*, 124 B.R. 475 (Bankr. W.D. Tex. 1991).

The debtor's interest in an annuity purchased by the debtor's employer as a reward for the debtor's productivity was included in the debtor's estate and was not eligible for an exemption as wages because the debtor's other wages already exceeded the exemption limit and the annuity would be paid whether or not the debtor was employed. *In re Gee*, 124 B.R. 581 (Bankr. N.D. Okla. 1991).

The debtor was allowed an exemption for 10 percent of an employment bonus as wages under Mo. Rev. Stat. § 525.030(2). The debtor was also allowed an exemption for an interest in an employment pension plan because the plan was reasonably necessary for the support of the debtor and family. *In re Smith*, 124 B.R. 787 (Bankr. W.D. Mo. 1991).

The debtor worked as a ranch hand and kept livestock production records on a computer although the recordkeeping was not a requirement of employment. The court held that the computer was eligible for an exemption as a tool of a trade. The court also held that the exemption, available only to bankruptcy debtors, for an interest in an IRA was constitutional. *In re Schumacher*, 124 B.R. 820 (Bankr. D. Mont. 1991).

INTEREST RATE. In a Chapter 13 case, the court held that the interest rate to be paid on deferred plan payments on the debtor's secured loan on an automobile is the prime rate of the Continental Illinois National Bank as of the date of bankruptcy filing. The court reasoned that the prime rate is the cost of borrowing funds by the creditor,

Ford Motor Credit Co. and includes risk factors. *In re Hudock*, 124 B.R. 532 (Bankr. N.D. Ill. 1991).

INVOLUNTARY PETITION. The debtor was served with an involuntary bankruptcy petition which the debtor did not answer. After default was entered against the debtor, the debtor moved to dismiss the case because the debtor was a farmer against whom an involuntary petition could not be served, arguing that the farmer exception was a jurisdictional requirement. The court held that the debtor's status as a farmer was an affirmative defense required to be plead in answer to the involuntary petition. *In re Frusher*, 124 B.R. 331 (D. Kan. 1991).

CHAPTER 12

PLAN. The Chapter 12 debtors' plan was not confirmed where the plan did not provide for payments to the unsecured creditors equal to what they would receive under Chapter 7; the debtors did not provide evidence of sufficient income to fund the plan, even as proposed; and the plan was not proposed in good faith where the plan provided for the transfer of scattered parcels of worthless land to the secured creditor in partial buy-down of the principal owed. *In re Braxton*, 124 B.R. 870 (Bankr. N.D. Fla. 1991).

FEDERAL TAXATION

ALLOCATION OF PLAN PAYMENTS OF TAXES. The debtors' Chapter 13 plan was not confirmed where the plan provided for payments of taxes to be allocated in inverse chronological order, allowing the oldest taxes to remain unpaid and discharged at the end of the plan. *In re Lambert*, 124 B.R. 345 (Bankr. W.D. Okla. 1991).

AVOIDABLE LIENS. The Chapter 7 debtors were not allowed to avoid unsecured federal tax liens involving nondischargeable taxes because avoidance of the liens would have no effect because the liens would otherwise remain effective against the debtors' post-petition property. *In re Leavell*, 124 B.R. 535 (Bankr. S.D. Ill. 1991).

AVOIDABLE TRANSFERS. When the debtor filed the 1987 income tax return, the debtor indicated that the overpayment was to be applied to the estimated taxes for 1988. The debtor filed bankruptcy six days later. The court held that the election to credit the overpayment against the 1988 taxes was not avoidable where no proof of intent to harm creditors was presented and the election was made pre-petition. *In re Simmons*, 124 B.R. 606 (Bankr. M.D. Fla. 1991).

CLAIMS. Because the debtor's books and records were in complete disarray, the IRS determined the debtor's income tax liability for three taxable years based upon the last complete return filed by the debtor. The court held that method was not sufficient to support the IRS claim but allowed the IRS additional time to amend its claim to base the claim on additional evidence in the form of preliminary "penciled" returns made by an accounting firm. *In re Fidelity America Financial Corp.*, 91-1 U.S. Tax Cas. (CCH) ¶ 50,161 (Bankr. E.D. Pa. 1990).

NET OPERATING LOSSES. The debtor made elections to carry forward net operating losses on income tax returns filed pre- and post-bankruptcy for pre-bankruptcy

taxable years. The bankruptcy trustee filed amended returns for those years with the net operating losses carried back, entitling the estate to refunds. The IRS denied the refund requests, citing the irrevocability of the elections. The trustee argued that the elections were avoidable preferential transfers. The court held that a trustee in bankruptcy may revoke the debtor's net operating loss carryforward election without approval from the IRS. *In re Russell*, 927 F.2d 413 (8th Cir. 1991).

POST-PETITION INTEREST. In a pre-Bankruptcy Code of 1978 case, the IRS was allowed post-petition interest on secured claims where the bankruptcy estate became solvent post-petition. *In re D.C. Sullivan & Co., Inc.*, 91-1 U.S. Tax. Cas. (CCH) ¶ 50,156 (1st Cir. 1991).

CONTRACTS

DISCLAIMER. For several years, the plaintiff purchased chemicals from the defendant for the control of nut grass and potato rot on the plaintiff's potato crops. The chemicals all contained printed disclaimers as to the defendant's liability for consequential damages from use of the chemicals. In a question certified from the Eleventh Circuit Court of Appeals, the court held that the disclaimer was not unconscionable because it is widely used in the farm chemicals industry as an acceptable method of shifting risk. *Southland Farms v. Ciba-Geigy Corp.*, 575 So.2d 1077 (Ala. 1991).

IMPLIED WARRANTY. The plaintiff purchased corn for feed from the defendant and fed the corn to pigs. After the pigs became ill and had reproductive problems, the plaintiff had the pigs and the corn tested. As soon as the plaintiff learned that the corn had toxins which caused the injury to the pigs, the plaintiff returned the unused corn to the defendant. The court held that the tests on the corn and discovery of the toxins were sufficient proof of the lack of merchantability of the corn to support the finding of breach of implied warranty of merchantability against the defendant. The court also held that the plaintiff gave the defendant timely notice by returning the corn as soon as the tests indicated the toxins. *Laird v. Scribner Coop, Inc.*, 237 Neb. 532, 466 N.W.2d 798 (1991).

CORPORATIONS

JURISDICTION. The plaintiff was injured by a cattle chute manufactured by a former Nebraska corporation owned by the sole shareholder of the defendant Nebraska corporation. The former corporation was liquidated by a creditor and the defendant did not manufacture cattle chutes but only sold equipment made by another Nebraska corporation unrelated to the defendant. The plaintiff argued that personal jurisdiction over the defendant was proper because the defendant advertised in national magazines and because the defendant should be held liable for products manufactured by the predecessor corporation. The court held that advertising in national magazines was not sufficient contacts with the plaintiff's state, Oklahoma, to support personal jurisdiction. Because the defendant was not liable for the torts of the predecessor corporation under Nebraska law, the tortious activity of the predecessor corporation was not sufficient contact with the plaintiff's state to support

jurisdiction. *Williams v. Bowman Livestock Equip. Co.*, 927 F.2d 1128 (10th Cir. 1991).

PIERCING THE VEIL. A debtor in bankruptcy had agreed to become the president and sole shareholder of a corporation formed to sell cattle after the other owners had been issued a cease and desist order by the Packers and Stockyards Administration. Creditors who had sold cattle to the corporation argued that the debtor should be held personally liable because the corporation was used to circumvent the PSA order. The court held that the corporate form would be disregarded. *In re Bailey*, 124 B.R. 348 (M.D. Fla. 1991), aff'g 112 B.R. 449 (Bankr. M.D. Fla. 1990).

FEDERAL AGRICULTURAL PROGRAMS

ALIEN AGRICULTURAL LABOR. The plaintiffs were farm laborers who challenged the 1990 determination of the annual seasonal agricultural worker shortage number to be zero. The court held that the plaintiffs did not have standing to bring the action because they failed to demonstrate any current or threatened injury from the determination. *Garcia v. Yeutter*, 756 F.Supp. 581 (D. D.C. 1990).

BRUCELOSIS. The APHIS has issued an interim rule changing the classification of Puerto Rice from Class A to Class Free. 56 Fed. Reg. 14460 (April 10, 1991).

The respondent was found to have violated 21 U.S.C. §§ 111, 120 by transporting cattle from one state to another without an accompanying owner's statement and health certificate and without subjecting the cattle to a brucellosis test within 30 days prior to interstate movement. The respondent claimed an exemption, under 9 C.F.R. § 78.9(b)(3)(iv), from the requirements because the cattle did not change ownership. The ALJ found that the respondent was not entitled to the exemption because the cattle were purchased by the respondent just prior to interstate movement. The respondent was fined \$1,000 for each violation. *In re Casey*, 49 Agric. Dec. 82 (1989).

CCC LOANS. The CCC has adopted as final amendments to the price support loan regulations providing that ten days after a cooperative is suspended from further participation in the price support program, CCC may on demand call all outstanding CCC price support loans. 56 Fed. Reg. 14846 (April 12, 1991).

FARM PROGRAMS. The U.S.D.A. has issued proposed regulations implementing the small or limited resource Farmer's initiative program provided for in the Agricultural Credit Act of 1987. 56 Fed. Reg. 15302 (April 16, 1991).

MARKETING ORDERS. The plaintiffs, handlers of navel oranges, challenged the USDA determinations of volume restrictions under the area marketing order to which the plaintiffs' were subject. The plaintiffs argued that the determinations did not comply with the notice and comment requirements of 5 U.S.C. §§ 551, 553. The court held that although the determinations did not comply with Section

551, the plaintiffs failed to demonstrate that the determinations would have been any different, and therefore, failed to prove damage to the plaintiffs. **Riverbend Farms, Inc. v. Yeutter, 48 Agric. Dec. 1 (E.D. Calif. 1989).**

The petitioner, a milk handler, challenged an order of the market administrator requiring the petitioner to refund excess utilization payments made due to an error of reporting by the petitioner. The petitioner argued that the administrator failed to conduct frequent enough audits to catch the error earlier or was equitably estopped from seeking the refund. The ALJ held that neither the statute nor regulations require any specific frequency of the audits and the administrator made no misrepresentations supporting equitable estoppel. In addition, the ALJ ruled that the petitioner could not succeed under either theory where the error was caused by the petitioner's own reporting. **In re Conesus Milk Producers, 48 Agric. Dec. 9 (1989).**

The petitioners challenged the federal marketing orders for navel and valencia oranges grown in Arizona and California. The petitioners argued that the orders were arbitrary and capricious in that the inclusion of Canada as a domestic market was based on stale records and that a hearing on changed conditions was refused. The ALJ and JO held that the determination of Canada as a domestic market was a discretionary nonreviewable order. **In re Belridge Packing Corp, 48 Agric. Dec. 16 (1989).**

The plaintiff challenged the reserve requirements under the almond marketing order as unconstitutional and in violation of the APA. The court dismissed the action for failure of the plaintiff to exhaust administrative remedies but allowed the action for determination of whether the U.S.D.A. has unreasonably delayed a final order in the administrative proceedings. Although the plaintiff demonstrated irreparable harm from the reserve requirements, the plaintiff failed to show that the administrative proceedings were futile. **Cal-Almond, Inc. v. Yeutter, 756 F.Supp. 1351 (E.D. Cal. 1991).**

PACKERS AND STOCKYARDS ACT

UNFAIR PRACTICE. The respondent was a registered marketing agency buying and selling livestock. After audits by the PSA, the respondent was found to have a deficit in the custodial account and to be insolvent, both unfair practices under 7 U.S.C. §§ 208, 213(a). The respondent's only defense was to assert that no checks were returned for insufficient funds. The ALJ held that to be no defense to the violations and suspended the respondent's license for 28 days and thereafter until the respondent demonstrated solvency and a positive balance in the custodial account. **In re Miller, 48 Agric. Dec. 171 (1988).**

PEANUTS. The CCC has issued interim regulations for the 1991 to 1995 crops of peanuts with respect to price support loans for warehouse stored peanuts; the terms and conditions governing the contracting of additional peanuts for export or crushing, handler recordkeeping and reporting; and penalties. **56 Fed. Reg. 16227 (April 19, 1991).** The ASCS has issued interim regulations with respect to farm poundage quotas and collection of marketing assessments for 1991 to 1995 peanuts. **56 Fed. Reg. 16206 (April 19, 1991).**

PERISHABLE AGRICULTURAL COMMODITIES ACT

FAILURE TO PAY PROMPTLY. The respondent had joined with another person in the produce business and had obtained a PACA license under the respondent's business name. The respondent broke off with the other party who continued the produce business but did not obtain a license, even after being informed of the need to do so. The complainant sold peas to the other party but was not paid. The JO held that the respondent had not given the buyer any express or implied authority to continue the produce business in the respondent's name and the respondent was not liable for the acts of the buyer. **Bud Antle, Inc. v. Spruton, Inc., 47 Agric. Dec. 1619 (1988).**

The respondent acted as an agent marketing cucumbers grown by the complainant. The complainant charged the respondent with failure to remit the proceeds of the cucumbers, less the agent's commission and provided invoices of the cucumber shipments. The JO held that the respondent failed to make payment for all shipments for which the respondent failed to provide evidence of payment or other disposition of the cucumbers. **Burnac Produce, Inc. v. Calavo Growers of California, 47 Agric. Dec. 1624 (1988).**

JURISDICTION. The complainant purchased nectarines from a third party and had them loaded onto a truck. The truck then went to the respondent's warehouse and picked up some grapes the complainant purchased from the respondent. One of the respondent's employees erroneously sprayed sulfur dioxide gas into the truck for the grapes, causing loss of the nectarines. The JO ruled that PACA did not confer jurisdiction over the complainant's reparation suit because the nectarines were not the subject of a sales contract between the complainant and the respondent. **Luna Co., Inc. v. Stevco, Inc., 47 Agric. Dec. 1738 (1988).**

LIABILITY. The complainant had consigned a truck load of lemons and oranges to a third party but while the truck was enroute, the truck was diverted to the respondent who paid the trucker and truck broker for the produce, even though the respondent did not receive an invoice showing ownership of the produce. The JO ruled that the respondent was liable for the value of the produce to the complainant because the respondent failed to verify ownership of the produce by the truck broker. **Pure Gold, Inc. v. B&G Produce, Inc., 47 Agric. Dec. 1741 (1988).**

The plaintiff sold produce to a third party who sold the produce to the defendant. The plaintiff argued that the defendant was liable for the third party's failure to pay for the produce under the PACA trust provisions. The court held that the PACA trust provisions applied only to the contract parties of each separate sales transaction. Therefore, because the plaintiff and defendant were not parties to the same sales contract, the defendant was not liable for the third party's failure to pay for the produce. **Universal Fruit Co., Inc. v. Windward Mgmt. Co. of Ill., 47 Agric. Dec. 1770 (N.D. Ill. 1988).**

The complainant sold 800 cartons of lettuce to the respondent through a broker. When the lettuce arrived, a federal inspection showed 19 percent condition defects and the respondent offered to the broker to sell the lettuce on consignment. The broker informed the complainant of the offer but the complainant refused. The broker, however,

told the respondent that it could sell the lettuce on consignment. The JO held that the broker had no authority to modify the contract and awarded the complainant the value of the lettuce, as determined by the price received by the respondent, less freight charges. **Frank Minardo, Inc. v. Finest Fruit, Inc.**, 47 Agric. Dec. 1784 (1988).

TRUST. The debtor had purchased potatoes from a seller who had purchased the potatoes from another seller. The court held that no PACA trust was established as between the debtor and the original seller because the trust existed only between the buyer and seller in each transaction. **In re So Good Potato Chip Co.**, 124 B.R. 298 (Bankr. E.D. Mo. 1991).

Under the terms of a written agreement between the creditor, a seller of mushrooms, and the debtor, the debtor was to pay for all shipments within 30 days but the creditor could not seek remedies for nonpayment until 60 days after shipment. The court held that the 60 day period acted to extend the time required for the debtor to pay for the mushrooms and thus exceeded the 30 day limitation for payment under PACA in order for the seller to be entitled to PACA trust funds. **In re Davis Distributors, Inc.**, 47 Agric. Dec. 1725 (4th Cir. 1988).

PESTICIDES. The plaintiff filed a personal injury action in negligence, strict liability and breach of implied warranty for inadequate labeling against the manufacturer of pesticides used on dogs. The manufacturer moved for partial summary judgment on the inadequate labeling claims, arguing that the Federal Insecticide, Fungicide and Rodenticide Act pre-empted the state negligence action. The court agreed and held that the inadequate labeling action was barred by pre-emption of FIFRA. **Papas v. Upjohn Co.**, 926 F.2d 1019 (11th Cir. 1991).

PRICE SUPPORT--TOBACCO. The CCC has issued the 1991 price support rates for the following types of tobacco:

Type	Cents per pound
Virginia, type 21	133.2
Ky. Tenn. types 22-23	136.7
Dark air cured, types 35-36	116.9
Virginia, type 37	117.7
Cigar-filler, types 42-44, 53-55	101.4
Puerto Rican, type 46	81.3

56 Fed. Reg. 16064 (April 19, 1991).

RICE. The FGIS has issued amendments to the proposed regulations governing grain standards for rice to include standards for glutinous rice. **56 Fed. Reg. 14213 (April 6, 1991).**

TOBACCO. The decedent had transferred a tobacco farm to the decedent and spouse as life tenants with the remainder to their daughter and husband. After the decedent's spouse died, the decedent sold the farm's federal tobacco allotment and quota to the defendant and the local ASCS office acknowledged the sale. The court held that state law controlled as to the property interest in the tobacco quota transferred by the decedent so as to limit the interest to that held by the decedent, a life interest. **Jeffress v. Stith**, 402 S.E.2d 14 (Va. 1991).

FEDERAL ESTATE AND GIFT TAX

DISCLAIMERS. The surviving spouse's disclaimer of one-half of a joint tenancy brokerage account held with the decedent was valid where made within nine months of the decedent's death. **Ltr. Rul. 9113011, Dec. 24, 1990.**

DISTRIBUTIONS. The estate representative made distributions of estate income to the sole beneficiaries in two taxable years without authorization by the will or prior court approval. When the impropriety of the distributions was noticed by the IRS, the representative sought probate court ratification of the distributions, which was obtained. The court held that the estate could not deduct the distributions from estate income because, under Oklahoma law, the distributions were not proper without prior court approval. **Murphy v. U.S.**, 91-1 U.S. Tax Cas. (CCH) ¶ 50,167 (W.D. Okla. 1991).

GENERATION SKIPPING TRANSFER TAX. The decedent's will bequeathed property to grandchildren and great-grandchildren. The IRS ruled that a great-grandchild whose mother and grandmother had both predeceased the decedent was not a skip person. **Ltr. Rul. 9114024, no date given.**

The taxpayer received an interest in a trust, irrevocable on September 25, 1985, including the power to appoint by will trust corpus to persons other than the taxpayer or the taxpayer's estate or creditors. The IRS ruled that the exercise of the power did not cause the trust property to be included in the taxpayer's gross estate nor subject the property to GSTT. **Ltr. Rul. 9114037, Jan. 9, 1991.**

When the estate filed its return in November 1987, the return failed to contain a certificate of the decedent's incompetency from before October 22, 1986 until the decedent's death. The IRS ruled that the late filing of the certificate did not invalidate the estate's eligibility for the mental incompetency exception under Temp. Treas. Reg. § 26.2601-1 where the return was filed before the temporary regulations were published adding the requirement for the certificate. **Ltr. Rul. 9115053, Jan. 16, 1991.**

GIFTS. The taxpayer transferred stock in a wholly-owned corporation to a trust with the taxpayer as sole income beneficiary and reserving the right to distribute trust corpus. The taxpayer transferred stock from the trust to 11 key employees as a reward for services to the company. The IRS ruled that the transfers would be gratuitous contributions to the corporation capital and therefore gifts to the shareholders. The transfers, however, were gifts of future interests in the capital of the corporation and not eligible for the annual exclusion. **Ltr. Rul. 9114023, Jan. 7, 1991.**

GROSS ESTATE. A trust became irrevocable in 1976 upon the death of the grantor. The trust provides for invasion of trust corpus for the care, support, maintenance, welfare and education of the beneficiary and gives the beneficiary the power to remove the trustee and appoint a bank or trust company as successor trustee. The IRS ruled that because the trust was irrevocable before 1979, the power to remove the trustee would not cause the trust to be included

in the beneficiary's estate. **Ltr. Rul. 9113026, Dec. 31, 1990.**

GUARANTEES. The taxpayer had made several personal guarantees of loans made by the taxpayer's children or corporations controlled by the taxpayer's children. The taxpayer established an irrevocable trust funded at the taxpayer's death with sufficient estate property to pay the anticipated taxpayer liability on the guarantees. The IRS held that the guarantees were taxable gifts and that, in the event of a primary obligor's default on a guaranteed loan, the amount of payment by the taxpayer, less any expected reimbursement, was a taxable gift. After the taxpayer's death, any payments made by the estate, less any expected reimbursements, would be deductible by the estate. **Ltr. Rul. 9113009, Dec. 21, 1990.**

INSTALLMENT PAYMENTS. The estate had elected to pay the federal estate tax in installments but after the estate made the first payment, the estate made a settlement with the IRS that the estate tax owed was less than originally stated in the return. The estate argued that the estate was entitled to a refund based on the difference between the amount due on the first installment actually paid and the amount due under the settlement. The court agreed with the IRS that the refund was to be credited to the future installments. **Est. of Bell v. Comm'r, 91-1 U.S. Tax Cas. (CCH) ¶ 60,065 (9th Cir. 1991), aff'g 92 T.C. 714 (1990).**

LIFE INSURANCE. Within one year before death, the decedent purchased life insurance policies on the decedent's life and designated sons as owners and beneficiaries. The decedent paid all of the premiums. The court held that the proceeds of the policies were not included in the decedent's gross estate. **Est. of Perry v. Comm'r, 927 F.2d 209 (5th Cir. 1991).**

Within three years of death the decedent purchased a life insurance policy on the life of the decedent and transferred the policy to an irrevocable trust with the surviving spouse and children as beneficiaries. The decedent and spouse paid the first premium and contributed funds to the trust during the trust's ownership of the policy. The IRS ruled that the proceeds of the policy were includible in the decedent's gross estate and that the surviving spouse's 50 percent share of the trust income was an eligible QTIP. **Ltr. Rul. 9113027, no date given.**

MARITAL DEDUCTION. The decedent's will bequeathed an usufruct to the surviving spouse in the decedent's community property until the death or remarriage of the surviving spouse. The IRS ruled that the usufruct was not eligible for the marital deduction. The decedent's children filed disclaimers of a portion of their interests in the community property subject to the usufruct and, under Louisiana law, the disclaimed interests combined with the usufruct to pass full title to the surviving spouse. The IRS ruled that such property was then eligible for the marital deduction. **Ltr. Rul. 9113008, Dec. 21, 1990.**

The taxpayer had made several personal guarantees of loans made by the taxpayer's children or corporations controlled by the taxpayer's children. The taxpayer established a revocable trust funded at the taxpayer's death with estate property to pay the anticipated taxpayer liability on the guarantees. The income beneficiary of the trust was

the surviving spouse. The IRS ruled that the surviving spouse's interest in the trust would be eligible for the marital deduction but that the value of the interest was to be decreased by the amount of the existing and future claims against the trust from the guarantees. In addition, another marital trust established for the surviving spouse would not qualify as QTIP if the revocable trust was not sufficiently funded to cover all guarantees. **Ltr. Rul. 9113009, Dec. 21, 1990.**

The decedent executed a will in 1969 which bequeathed to the surviving spouse "an amount equal to the maximum estate tax marital deduction." The IRS ruled that this was a formula bequest subject to the ERTA transitional rule limiting the marital deduction to \$250,000 or one-half of the gross estate. The IRS noted that the will contained no specific indication that changes in the federal tax law should apply to the will. **Ltr. Rul. 9114004, no date given.**

The decedent's will contained a marital trust bequest to the surviving spouse equal to the amount which, in conjunction with the unified credit, would produce no federal estate tax. The remainder of the estate passed to a residuary trust for the decedent's children. The decedent's estate contained two ranches but the will did not provide for apportioning the ranches between the marital and residuary trusts. The court apportioned the ranches to the two trusts based on the decedent's intentions to avoid estate tax and to keep the ranches in the family. **Est. of McCampbell v. Comm'r, T.C. Memo. 1991-141.**

The decedent's will bequeathed a portion of the estate to the surviving spouse "equal to the maximum marital deduction" but also provided that the marital bequest be reduced by the amount needed to increase the estate to the amount which, after the unified and state death tax credits, would result in no federal estate tax. The remainder of the estate passed to the decedent's children. The IRS ruled that the marital bequest was subject to the ERTA transition rule and was limited to the greater of \$250,000 or one-half of the estate. The IRS noted the contrary authority of *Levitt v. Comm'r*, 95 T.C. 289 (1990). **Ltr. Rul. 9115062, Jan. 18, 1991.**

SPECIAL USE VALUATION. The IRS has issued the list of average annual effective interest rates charged on new loans by the Farm Credit Bank system to be used in computing the value of real property for special use valuation purposes:

<u>District</u>	<u>Interest rate</u>
Baltimore	10.68
Columbia	11.31
Louisville	11.45
Omaha	10.87
Sacramento	11.65
St. Louis	10.73
St. Paul	11.14
Spokane	11.28
Springfield	11.01
Texas	10.55
Wichita	10.83

Rev. Rul. 91-24, I.R.B. 1991-13, 18.

Farm land was owned equally by two sisters as tenants-in-common. Each sister left the interest in the farm to a

qualified heir but only one sister's estate elected special use valuation. The IRS filed a recapture tax lien on the entire property. The two heirs proposed partitioning the land and sought approval for removal of the lien on one part of the land. The IRS ruled that the partition did not cause recapture of special use valuation benefits but that the change in the lien required District Director approval. **Ltr. Rul. 9113028, no date given.**

TRUSTS. The taxpayer established irrevocable trusts for adult children and minor great-grandchildren with the beneficiaries having current withdrawal rights. Trust corpus was to be distributed to the children at age 35 and to the great-grandchildren at ages 25, 30 and 35. The taxpayer was the trustee of the trusts but had no power to change the trusts or use trust property to purchase life insurance on the life of the taxpayer. Trust income and corpus could be distributed for the support, maintenance, medical care or education of the beneficiary. Trust corpus could also be invaded for travel, the purchase of a first home or the establishment of a business, but only in the discretion of a disinterested trustee other than the taxpayer. The IRS ruled that contributions to the trusts were completed gifts and the trusts would not be included in the taxpayer's gross estate. **Ltr. Rul. 9113010, Dec. 24, 1990.**

VALUATION. The taxpayer transferred a one-half undivided interest in real property to a brother. The taxpayer and brother contributed the real property to a partnership for construction of a building. The court held that the value of the one-half interest for gift tax purposes was the fair market value less 15 percent for the fractional interest. **Mooneyham v. Comm'r, T.C. Memo. 1991-178.**

FEDERAL INCOME TAXATION

INVESTMENT TAX CREDIT. After failing for two years to sell real property which included investment tax credit property, the partnership contributed the property to another partnership in exchange for a 25 percent interest in that partnership. An insurance company contributed cash in exchange for the remaining partnership interest. Some of that cash was distributed to the original partnership to equalize the partners' interests in the new partnership. The court held that the investment tax credit was recaptured because the contribution of the property to the partnership was a sale to the insurance company and not a mere change in the form of doing business. **Jacobson v. Comm'r, 96 T.C. No. 21 (1991).**

LIKE-KIND EXCHANGES. The IRS has adopted as final regulations governing exchanges of personal property and multiple properties under I.R.C. § 1031. See 1 **Ag. Law Digest** 106 (1990) for discussion of the regulations. **56 Fed. Reg. 14851 (April 12, 1991).**

LIMITATION OF LOSS DEDUCTION. The court held that the taxpayers were not at risk as to investments in a circular lease/buyback computer sales agreements where the taxpayers received guarantees of the lessee's performance. **Young v. Comm'r, 926 F.2d 1083 (11th Cir. 1991), aff'g T.C. Memo. 1988-440 and aff'g Cohen v. Comm'r, T.C. Memo. 1988-584.**

NET OPERATING LOSSES. A corporation filed short taxable year returns for January 1, 1984 through May 10, 1984 as an S corporation and May 11, 1984 through December 31, 1984 as a C corporation. In 1986 the corporation had net operating loss carrybacks. The IRS ruled that the short taxable years would be treated as one taxable year for purposes of the three years allowed for carrying back net operating losses. **Ltr. Rul. 9114003, Dec. 18, 1990.**

PARTNERSHIPS

ADMINISTRATIVE ADJUSTMENTS. Although the IRS sent a final partnership administrative adjustment (FPAA) within the limitations period, the FPAA was sent three days after the commencement notice. The court held that the FPAA was timely filed and tolled the statute of limitations and that the failure to send the FPAA after 120 days after the commencement notice only invalidated the commencement notice, allowing the partners the election to treat partnership items as non-partnership items. **White & Case v. U.S., 91-1 U.S. Tax Cas. (CCH) ¶ 50,173 (Cl. Ct. 1991).**

PASSIVE ACTIVITY LOSSES. The IRS has issued proposed regulations governing the treatment of self-charged items of income and expense for purposes of the limitation on passive activity losses and credits. The regulations cover loans to or from a passthrough entity, a partnership or S corporation, and to an owner of 10 percent or more of the entity. If an owner's allocable share of all self-charged interest deductions from owner loans to an entity exceed interest income from the loans, a portion of the interest income is recharacterized as passive interest income based on the ratio of passive interest deductions to total interest deductions. The recharacterized passive income is allocated among the owner's passive activities based upon the proportion of the passive interest deductions of those activities. In addition, if income is recharacterized as passive under these rules, interest expenses attributable to that income are also recharacterized as passive. **56 Fed. Reg. 14034, April 5, 1991, adding Prop. Treas. Reg. § 1.469-7.**

RESPONSIBLE PERSON. Two shareholders who were president and secretary/treasurer were held to be "responsible persons" subject to the 100 percent penalty for failure of their corporation to pay withholding taxes because the shareholders had the ability and authority to make the required payments. The corporation general manager was also found to be a "responsible person" but was not subject to the penalty because the manager lacked the ability and authority to make the payments. **Molino v. U.S., 91-1 U.S. Tax Cas. (CCH) ¶ 50,160 (C.D. Calif. 1991).**

S CORPORATIONS

STATUTE OF LIMITATIONS. The IRS assessed a deficiency against an S corporation shareholder within an extended limitations period as to the shareholder but after the limitations period as to the corporation. The court held that the assessment was timely where the assessment related to disallowance of a loss deduction to the corporation which flowed through to the shareholder. **Bufferd v. Comm'r, T.C. Memo. 1991-170.**

TERMINATION. A S corporation terminated its S corporation status during its taxable year and prepared its tax returns for its short S and C taxable years with the intent to elect to assign items to each short taxable year under normal tax accounting rules; however, the corporation failed to file the election with the C return. The IRS granted an extension in which to file the election. **Ltr. Rul. 9115002, no date given.**

After a review of the S corporation's bylaws, it was discovered that the corporation's two types of stock had possible differences in dividends and liquidation rights. The IRS ruled that the termination of S corporation status because of the two classes of stock was inadvertent where the corporation immediately amended the bylaws to make the two types of stock identical except for voting rights. **Ltr. Rul. 9115003, Dec. 21, 1990.**

SAFE HARBOR INTEREST RATES

MAY 1991

	Annual	Semi-annual	Quarterly	Monthly
Short-term				
AFR	6.82	6.71	6.65	6.62
110% AFR	7.52	7.38	7.31	7.27
120% AFR	8.21	8.05	7.97	7.92
Mid-term				
AFR	7.98	7.83	7.75	7.71
110% AFR	8.88	8.61	8.52	8.46
120% AFR	9.62	9.40	9.29	9.22
Long-term				
AFR	8.35	8.18	8.10	8.04
110% AFR	9.20	9.00	8.90	8.84
120% AFR	10.06	9.82	9.70	9.62

PARTNERSHIPS

AUTHORITY. Under the defendant's partnership agreement, the general partner had the authority to conduct partnership business. The general partner obtained a loan from the plaintiff for the partnership but used the proceeds to pay off non-partnership debts. The court held that, although the partnership agreement gave the general partner the power to make loans, the issue of whether the general partner had the authority to use the proceeds of those loans for non-partnership purposes was a factual jury question. **First Western Bank v. Livestock Yards, 466 N.W.2d 853 (S.D. 1991).**

PRODUCTS LIABILITY

FERTILIZER. Potato farmers sued the seller of fertilizer supplied to the local distributor for damages to their crops from contamination of the fertilizer with herbicide. At the appellate level, the seller raised the issue of lack of jurisdiction under Colo. Rev. Stat. § 13-21-402 which prevents a strict liability action against a seller unless the seller manufactured the defective product. The court held that although the seller was not the manufacturer of the defective fertilizer, the seller had to raise the statute as an affirmative defense at trial. **Stone's Farm Supply, Inc. v. Deacon, 805 P.2d 1109 (Colo. 1991).**

RIPARIAN RIGHTS

DRAINAGE. Neighboring landowners were required to remove a dike and fill dirt which caused a natural drainageway to be blocked which in turn caused rain water to collect on the plaintiff's land, ruining the plaintiff's crops. The fact that the plaintiff had also leveled land in the same area did not affect the defendant's actions because the plaintiff's leveling still made use of and did not alter the natural drainage on other property. **Romshek v. Osantowski, 237 Neb. 392, 466 N.W.2d 482 (1991).**

The plaintiff alleged injury to rights to water in a ditch flowing through the plaintiff's property resulting from the defendants' construction of a pond on their property on the same ditch. The court upheld the trial court's determination that the pond did not decrease the flow of water in the ditch and that the plaintiff's water rights were not injured. **Boylan v. Van Dyke, 806 P.2d 1024 (Mont. 1991).**

SECURED TRANSACTIONS

GOOD FAITH. A creditor had perfected security interests in the debtor's account receivables from sales of cotton. The plaintiff sold cotton to the debtor but was not paid from the proceeds of the resale of the cotton by the debtor. The plaintiff alleged that the creditor's security interests in the accounts should not be given priority over the plaintiff's interest in the cotton because of the creditor's bad faith in controlling the debtor's payments for cotton. The court held that the creditor did not exert influence over the debtor's affairs in prejudice of the plaintiff. **Dixie Bonded Warehouse v. Allstate Financial Corp., 755 F.Supp. 1543 (M.D. Ga. 1991).**

NOTICE OF SALE. After the debtors' default on a loan, they met with the secured creditor about the sale of the collateral farm machinery. The collateral to be sold was listed with acceptable prices and a handwritten memo was given to the debtors stating that the collateral would be sold at an auction in 11 days if not previously sold by the debtors. Only a couple of items were sold at the auction and the rest were sold by individual sales. The debtors objected to the creditor's suit for a deficiency, claiming insufficient notice of the sale of the collateral. The court held that the handwritten memo was insufficient notice of the auction sales because it did not contain any specific terms of sale. The post-auction sales also were without any written notice. Thus, the court dismissed the deficiency judgment for the creditor. **Walker v. Grant County Savings & Loan, 803 S.W.2d 913 (Ark. 1991).**

STATE TAXATION

AGRICULTURAL USE. The taxpayer owned 344 acres which were leased as pasture for several years. The taxpayer had the land platted into nine tracts, three of which had been sold for residential development. The remaining acres were leased as pasture at the time the remaining land was assessed as non-agricultural land because the taxpayer intended to sell the remaining tracts. The court held that the future intent of the taxpayer was not relevant to the current classification of the land and that the assessment must be based on the current use of the land as pasture. **Estes v. Colorado Bd. of Assessment, 805 P.2d 1174 (Colo. Ct. App. 1990).**

VETERINARIANS

SUSPENSION. The respondent's accreditation as a veterinarian was suspended for two months for dating and signing animal health certificates before properly completing them and for failure to completely fill out health certificates. The lesser penalty resulted because all cattle involved were inspected and were not in danger of spreading contagious diseases. **In re Myers, 48 Agric. Dec. 119 (1989).**

CITATION UPDATES

In re Ripley, 926 F.2d 440 (5th Cir. 1991) (post-petition tax claims) see p. 72 *supra*.

Illinois Nat'l Bank of Springfield v. U.S., 756 F.Supp. 1117 (C.D. Ill. 1991) (taxable gifts to trusts) see p. 74 *supra*.

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